UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

PACIFICA HOTEL COMPANY D/B/A JAMAICA BAY INN MARINA DEL REY, TAPESTRY COLLECTION BY HILTON

Employer

and **Case 31-RC-352713**

UNITE HERE LOCAL 11

Petitioner

DECISION ON OBJECTIONS AND NOTICE OF HEARING

On October 15, 2024, Unite Here Local 11 ("Union") filed a representation petition under Section 9(c) of the National Labor Relations Act ("the Act") seeking to represent certain employees of Pacifica Hotel Company d/b/a Jamaica Bay Inn Marina Del Rey, Tapestry Collection by Hilton.[1] Pursuant to a Stipulated Election Agreement, an election was conducted on November 12, in a unit of all full-time and regular part-time employees working for the Employer at its facility located at 4175 Admiralty Way, Marina del Rey, CA 90292. The tally of ballots showed that of the approximately 78 eligible voters, 38 cast ballots for the Union, and 37 cast ballots against representation. There were no challenged ballots. Therefore, the Union received a majority of the votes.

On November 19, 2024, the Employer timely filed six objections in the Employer's Objections to the Conduct of the Election and Conduct Affecting the Results of the Election (Employer's Objections) as well as an offer of proof in support thereof (offer of proof).

Having carefully considered the Employer's objections and offer of proof, and for the reasons set forth below, I conclude that the Employer's offer of proof is insufficient to sustain Objections 1, 2, 3, and 6. Accordingly, I am overruling those objections. With respect to Objections 4 and 5, I find that they raise substantial and material issues of fact that can be best resolved on the basis of record testimony taken at hearing. Accordingly, I am setting Objections 4 and 5 for hearing.

I. Legal Standard

Board Standards for Setting Aside Elections and for Evaluating Offers of Proof

It is well-settled that the Board will not lightly set aside a representation election and that the burden of proof on a party seeking to have a Board-supervised, secret-ballot election set aside is a heavy one. *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000); *Delta Brands, Inc.,* 344 NLRB 252, 253 (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 806 (6th Cir. 1989). The objecting party bears the "entire burden" of showing evidence that misconduct warrants

[1] All dates herein are calendar year 2024 unless specified otherwise.

overturning the election. *Id.* at 328. The objecting party's burden encompasses every aspect of a prima facie case. *Sanitas Service Corp.,* 272 NLRB 119, 120 (1984). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania, Inc.*, 360 NLRB 637 (2014), citing *Polymers, Inc*., 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970).

Offers of proof

As a procedural matter, a party does not have an automatic right to a hearing on its objections. 29 C.F.R. § 102.69(c)(1). An evidentiary hearing is appropriate only "[w]hen an objecting party raises substantial and material issues of fact sufficient to support a prima facie showing of objectionable conduct." *Swing Staging, Inc. v. NLRB*, 994 F.2d 859, 862 (D.C. Cir. 1993); see also *Durham School Servs. v. NLRB*, 821 F.3d 52, 58 (D.C. Cir. 2016). The objecting party has the duty to furnish evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election. *Jacmar Food Service Distribution*, 365 NLRB No. 35, slip op. at fn. 2*,* citing *Transcare New York, Inc.*, 355 NLRB 326, 326 (2010). The objecting party cannot rely on bare assertions or conclusory statements to raise an issue requiring a hearing and has the duty of furnishing evidence or description of evidence that, if credited at a hearing, would warrant setting aside the election. *Transcare New York, Inc.*, 355 NLRB 326, 326 (2010); *In re Affiliated Comput. Servs.*, 355 NLRB 899, 903 (2010); *The Daily Grind*, 337 NLRB 655 (2002) (unsupported allegations are insufficient to trigger administrative investigations). Rather, the objecting party must point to "specific evidence of specific events from or about specific people." *Amalgamated Clothing Workers of Am.*, 424 F.2d 818, 828 (D.C. Cir. 1970) (quoting *United States Rubber Co. v. NLRB*, 373 F.2d 602, 606 (5th Cir. 1967)). With respect to offers of proof, the Board has found that an objecting party "may satisfy its burden by specifically identifying witnesses who would provide direct rather than hearsay testimony to support its objections, specifying which witnesses would address which objections." *Transcare New York, Inc.*, above; *Heartland of Martinsburg*, 313 NLRB 655 (1994); *Holladay Corp.*, 266 NLRB 621 (1983); NLRB Casehandling Manual Part Two, Section 11392.6.

Conduct by a party

In determining whether to set aside an election, the Board applies an objective test, which is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716, 716 (1995). In determining whether a party's conduct has the tendency to interfere with employee free choice, the Board considers a number of factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

Third-party or nonparty conduct

In determining whether an employee is acting with apparent authority on behalf of an employer or union when the employee makes a particular statement or takes a particular action, the Board applies the common law principles of agency. See, e.g., *Cooper Industries*, 328 NLRB 145 (1999). "Apparent authority 'results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question.' Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief." *MasTec Direct TV*, 356 NLRB at 809-10, quoting *Corner Furniture Discount Center, Inc*., 339 NLRB 1122, 1122 (2003). Accordingly, two conditions must be met in order to establish apparent authority: (1) the principal must make some sort of manifestation to a third party; and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. See, e.g., *Millard Precision Services*, 304 NLRB 770, 771 (1991) (citing RST 2nd of Agency, § 8 (1958)).

When the alleged misconduct is committed by a third party, the objecting party must establish that the conduct was, "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *Mastec Direct TV*, 356 NLRB 809, 810 (2011); *Phoenix Mechanical*, 303 NLRB 888, 888 (1991); *Lamar Advertising of Janesville*, 340 NLRB 979, 980 (2003); *Duralam, Inc.*, 284 NLRB 1419, 1419 (1987). The Board recognizes that the conduct of third parties tends to have less coercive effect upon the voters than similar conduct attributable to the employer who has, or the union which seeks, control over the employees' working conditions. *Orleans Mfg. Co.*, 120 NLRB 630, 633 (1958); see also *Owens-Corning Fiberglas Corp.*, 179 NLRB 219, 223 (1969); *Mastec Direct TV*, 356 NLRB at 811. Further, the Board acknowledges that because unions and employers cannot control non-agents, "the equities militate against setting aside elections on the basis of conduct by third parties." *Lamar Advertisisng*, 340 NLRB at 980. When determining whether third-party threats constitute conduct so aggravated as to create a general atmosphere of fear and reprisal, the Board considers, "(1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were widely disseminated within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was 'rejuvenated' at or near the time of the election." *PPG Industries*, 350 NLRB 225, 226 (2007), citing *Westwood Horizons Hotel*, supra.

II. The Employer's Objections

The Employer has raised six objections and timely submitted an offer of proof in support of its objections.

Objection No. 1 – During the critical period, the Union, through its agents, engaged in intimidation and coercive misconduct by threatening physical violence and making discriminatory remarks against a bargaining unit employee.

The Employer's offer of proof for Objection 1 attributes objectionable conduct to a unit employee ("Employee A") who purportedly made derogatory, threatening and discriminatory statements to another unit employee ("Employee B") to coerce, bully, and intimidate them into supporting the Union in the election. The offer of proof does not specify the date of the incident or whether the statements were made within the critical period. The Employer identified three bargaining unit witnesses who would testify that Employee A threatened Employee B with physical violence, and made derogatory and discriminatory statements mocking Employee B's sexual orientation and gender identity. However, according to witness declarations furnished as part of the Employer's offer of proof, only one proffered witness—Employee B—possesses direct knowledge of the alleged events; the other two employees' testimony appear to amount to hearsay. The offer of proof does not describe evidence that other bargaining unit employees heard Employee A's statements or that they were told about the purported statements.

The Employer alleges that Employee A is an agent of the Union because a Union Representative ("Union Representative A") designated Employee A, along with other bargaining unit members, as authorized agents for the purposes of soliciting support for the Union by obtaining signed union authorization cards from other bargaining unit employees. Notably, the offer of proof indicates that Union Representative A made that representation to Employee A and the other alleged agents themselves, but does not establish that the same representation was made to other employees. There is no evidence in the offer of proof to show that Employee A led any meetings or other activities on behalf of the Union. In fact, the offer of proof indicates that two Union representatives conducted and led union meetings and other activities on behalf of the Union, rather than utilizing unit employees as spokespersons.

The Employer's offer of proof in support of Objection 1 is insufficient to warrant a hearing for several reasons. First, although the Employer's objection asserts that the alleged threat and coercive statement were made during the critical period, the witness declaration provided in the offer of proof is not specific as to the timing. See *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1278 (1961) (only conduct occurring after the petition's filing date may be the subject of an objection).

Second, the Employer's offer of proof fails to describe sufficient evidence to establish that Employee A was an agent of the Union. The burden of proving agency is on the party asserting it. *Millard Processing Services*, 304 NLRB 770, 771 (1991), enfd. 2 F.3d 258 (8th Cir. 1993), cert. denied 510 U.S. 1092 (1994). To establish agency status, the Employer relies on the fact that Employee A served as an agent of the Union for purposes of collecting signatures in support of the Union. The Board has long held that an employee who solicited and obtained signatures on authorization cards is not necessarily an agent of the union. *United Builders Supply Co*., 287 NLRB 1364, 1365 (1988). Additionally, it is well settled that an asserting party does not establish an employee's agency status on the mere basis that the employee is engaged in "vocal and active union support." Id. While employees who solicit authorization cards are deemed special agents of a union for the limited purpose of assessing the impact of statements made about union policies, the Board has specifically held that this special agency status does not extend to alleged threats of violence, even when made in the course of card solicitation, because such statements cannot reasonably be construed to represent union policies. *HCF Inc.*, 321 NLRB 1320, 1320 (1996).

Moreover, the Board has long held that employee conduct is not attributable to a union absent proof that it was authorized by, participated in, condoned by, ratified by, or adopted by union officials. *Aladdin Hotel Corp*., 229 NLRB 499, 505 (1977), enf. denied on other grounds 584 F.2d 891, 891 (9th Cir. 1978) (citing *N.L.R.B*. v. *Dallas General Drivers Warehousemen and Helpers Local 745,* 264 F.2d 642, 648 (5th Cir. 1959)).

The Employer's offer of proof does not describe sufficient evidence to establish Employee A as an agent of the Union. Although Employee A may have solicited signatures on union authorization cards, this alone does not confer general agency status on an individual. Here, the conduct at issue did not occur in the context of soliciting Employee B's signature on the authorization card, and even if it did, it cannot reasonably be construed to represent union policies. Furthermore, the offer of proof establishes that the Union had its own spokespersons separate and apart from union activists like Employee A. *See Corner Furniture Discount Center,* 339 NLRB at 1123 (employee who organized and spoke at union campaign meetings, solicited authorization cards, and played a leading role in the campaign established only that the employee was a leading union supporter and was not sufficient to establish apparent agency). Moreover, the offer of proof does not proffer any evidence to establish that the Union was aware of Employee A's statements, much less that it authorized or condoned any of Employee A's conduct. Accordingly, the Employer's offer of proof is insufficient to confer agency status on Employee A.

Of course, as noted above, third-party conduct, including that of rank-and-file employees, may also interfere with employee free choice in an election. However, the Employer's offer of proof does not describe evidence sufficient to meet the high standard for overturning an election due to third-party misconduct. For instance, the offer of proof identifies only one employee who was subject to the alleged threats and does not reflect that the threats were disseminated throughout the entire bargaining unit, or beyond three employees. The offer of proof is also unspecific as to the timing of the statements; from the witness declaration it's unclear whether the statements were made or reiterated near the timing of the election. Finally, the nature of the statements described in the offer of proof does not support finding a general atmosphere of fear and reprisal. The Board has held that threats by employees to their coworkers, including threats of physical violence, threats of work sabotage and threats of unspecified reprisals, such as "getting even," were insufficient to set aside an election. See *Mastec Direct TV*, 356 NLRB 809, 812-813 (2011).

Accordingly, I am overruling Employer's Objection 1 because the offer of proof does not describe evidence that, if credited at hearing, would require the election to be set aside.

Objection No. 2 – During the critical period and up through the time of the election, the Union through its agents and organizers made intimidating and threatening remarks against a bargaining unit employee.

In support of Objection No. 2, the offer of proof alleges that a bargaining unit employee ("Employee C") told another bargaining unit employee ("Employee D") that a Union Representative ("Union Representative B") said that Employee D was a traitor for not supporting the Union and that the Union would not represent traitors after the Union won. The

offer of proof does not specify the date of the incident or whether the statement was made within the critical period. The Employer contends that Union Representative B's statement intimidated, coerced, and threatened Employee D into changing her vote, which affected the results of the election.

Additionally, the Employer in its objections alleges that Employee A, an alleged agent of the Union, intimidated and threatened Employee D and several other bargaining unit employees by telling them that they should be careful if they removed their Union button or there would be consequences. The offer of proof does not specify the date of the incident or whether the statement was made within the critical period.

The Employer's offer of proof in support of Objection 2 is insufficient to warrant a hearing. As an initial matter, the offer of proof fails to establish that the alleged statements were made during the critical period.

With respect to the portion of the objection concerning Union Representative B calling Employee D a traitor and threatening that the Union wouldn't represent "traitors" once elected, the only evidence proffered in the offer of proof is hearsay.[2]

With respect to the portion of the objection concerning Employee A's purported threat that there would be consequences if employees removed their Union insignia, as discussed above, the Employer's offer of proof does not establish that Employee A was acting as an agent of the Union when they made this statement. Therefore, this objection must be analyzed under the standard applied to third-party conduct. Here again, the Employer's offer of proof does not describe conduct that would require the election to be set aside under this standard. Although the offer of proof indicates the single threat may have been made to all housekeeping employees, it is unclear whether it was disseminated beyond that group to the entire unit. Furthermore, the timing of the statement is unclear. Additionally, the person who made the threat was not in a position to carry it out as there is no evidence they were in a position of power or coercive control over their coworkers. Finally, the nature of the threat would not support a finding of a general atmosphere of fear and reprisal.

Based on the foregoing, I am overruling Employer's Objection 2 because the offer of proof does not describe evidence that, if credited at hearing, would result in the election being set aside.

Objection 3 – During the critical period, the Union engaged in misconduct when its agent (a member of the bargaining unit) granted the Union unauthorized access to the Employer's non-public areas and confidential employee information.

The Employer, in Objection No. 3, asserts that on October 14, a member of its management team granted access to their spouse—a rank-and-file employee ("Employee E")—

[2] The Employer does not contend that Employee C was acting as an agent of the Union when they repeated Union Representative B's statement to Employee D.

who brought a delegation of Union representatives, unit employees, and other Union supporters into the non-public, back-office areas of the Employer's facility for the purpose of talking to the Employer's General Manager to demand recognition for the Union. The witness declarations included in the offer of proof indicate that employees heard Employee E tell them to wait to enter the facility until his wife, the purported manager, opened the door for them. According to the offer of proof, the individuals in the delegation were yelling and the Employer's General Manager appeared fearful and was crying during the confrontation. The Employer also asserts that the delegation blocked ingress and egress from the Employer's back-office area, effectively holding people hostage. However, the witness declarations in the offer of proof do not address that assertion.

Additionally, the Employer in its objections and offer of proof asserts that Union Representative A told Employee B that a member of management provided Union Representative A with confidential employee lists, and that this occurred before the filing of the petition. Employee B's declaration submitted with the offer of proof indicates only that Union Representative A said that he had received a list of employee names from a member of management but does not indicate whether the list included any other information that might be considered confidential.

The Employer's offer of proof with respect to this objection is insufficient to warrant a hearing because it describes conduct that occurred before the critical period commenced, prior to the filing of the petition on October 15, 2024. Even assuming the conduct had occurred during the critical period, the offer of proof is nevertheless insufficient to establish that the election should be set aside because it does not contain evidence that Employee E was acting as an agent of the Union when he entered the Employer's facility. Furthermore, according to the offer of proof, Employee E and the delegation entered the facility with the permission of a purported manager. Even viewing the objection as alleging objectionable pro-union supervisory conduct, the offer of proof is insufficient. In *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004), the Board articulated a two-part standard to be applied in such cases. First, the Board examines whether the supervisor's pro-union conduct reasonably tended to coerce or to interfere with employee free choice. The Board weighs the nature and degree of supervisory authority possessed by those engaged in the pro-union activity and the nature, extent, and context of the conduct in question. Second, the Board examines whether the conduct interfered with the employees' freedom of choice to the extent that it materially affected the outcome of the election. This inquiry requires consideration of the margin of victory, whether the conduct was widespread or isolated, the timing of the conduct, the dissemination of the conduct, and the lingering effect of the conduct. The Employer's offer of proof provides no details as to the extent or nature of supervisory authority possessed by the purported manager who granted the Union delegation access to the facility for the purpose of demanding recognition of the Union. Accordingly, there is no basis in the offer of proof to conclude that the conduct reasonably tended to coerce or interfere with employee free choice in the election.

Finally, with respect to the portion of the objection concerning the employee list, the only evidence described in the offer of proof was hearsay.

Accordingly, I am overruling Employer's Objection 3 because the offer of proof does not describe evidence that, if credited at hearing, would result in the election being set aside.

Objection 4 – During the critical period, the Union engaged in misconduct by requiring bargaining unit employees to take photographs with their signed union cards, and by misleading employees by telling them that the photographs were required by law. Additionally, the Union by its agents threatened to reveal an employee's photograph with their union authorization card to the Employer if the employee were to withdraw support from the Union.

After due consideration and based upon preliminary investigation of the evidence proffered with respect to Employer's Objection 4, I conclude that the evidence could be grounds for setting aside the election if it were introduced at hearing, and it raises substantial and material factual issues which can best be resolved by a hearing. Accordingly, such hearing is ordered below pursuant to Section 102.69(c)(1)(ii) and (d) of the Board's Rules and Regulations.

Objection 5 – During the critical period, the Union engaged in misconduct by requiring bargaining unit employees to film a video, reciting a script prepared by the Union. The Union told employees they were required to participate in the video because they had signed a union authorization card.

After due consideration and based upon preliminary investigation of the evidence proffered with respect to Employer's Objection 5, I conclude that the evidence could be grounds for setting aside the election if it were introduced at hearing, and it raises substantial and material factual issues which can best be resolved by a hearing. Accordingly, such hearing is ordered below pursuant to Section 102.69(c)(1)(ii) and (d) of the Board's Rules and Regulations.

Objection 6 – Union supporters engaged in a wide array of misconduct that in the aggregate, created an atmosphere of fear and reprisal such that it rendered the free expression of choice impossible.

Employer Objection No. 6 is largely a catch-all objection that includes the alleged conduct attributed to rank-and-file employees already addressed above, such as the threats of unspecified reprisals; threats of physical violence; discriminatory and homophobic remarks; and general harassment. The Employer also argues that the Union's actions of making misleading and false representations about employees being required to take a photograph with their authorization cards also contributed to the atmosphere of fear and reprisal created by the nonparty conduct. I have already addressed these allegations above.

Additionally, the Employer references two other incidents in support of this objection. First, in the objection itself the Employer describes a situation in which an unidentified employee was confronted by an unidentified union supporter three days before the election. However, the offer of proof does not address this portion of the objection or identify witnesses who would provide evidence in support of it. Finally, in its offer of proof the Employer contends that Employee A, an alleged Union agent, approached another employee ("Employee G") while they

were in line to vote at the election, and told Employee G they would be deported. The offer of proof does not provide any additional detail, or even reflect that Employee A's statement was connected in any way to the election or to Employee G's support for the Union or lack thereof. Thus, even applying the standard for third-party conduct, the evidence is insufficient to establish that this statement would have created a general atmosphere of fear and reprisal.

Based on the foregoing, I am overruling Objection 6.

III. Conclusion

Based on the above, I hereby overrule the Employer's Objections 1, 2, 3 and 6. With respect to Employer Objections 4 and 5, I have concluded that the evidence described in the offer of proof could be grounds for setting aside the election if introduced at hearing. Therefore, in accordance with Section 102.69(c)(1)(ii) and (iii) of the Board's Rules and Regulations, **IT IS ORDERED THAT** a hearing will be held before a Hearing Officer designated by me, for the purpose of receiving evidence to resolve the issues raised by the Employer's Objections 4 and 5. At the hearing the parties will have the right to appear to give testimony, and to examine and cross-examine witnesses. Upon the conclusion of the hearing, the Hearing Officer shall submit to me and serve on the parties a report containing resolution of the credibility of witnesses, findings of fact, and recommendation as to the disposition of Employer's Objections 4 and 5.

IV. Notice of Hearing

At **9:00 a.m. on Tuesday, April 22, 2025,** by Zoom videoconference, the hearing on the Employer's Objections 4 and 5, as described above, will be conducted before a Hearing Officer of the National Labor Relations Board. The hearing will continue on consecutive days thereafter until concluded.

//

//

//

//

//

//

//

//

//

V. Request for Review

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and may be filed at any time following this decision until 14 days after a final disposition of the proceeding by the regional director. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: April 8, 2025

Danielle Pierce

Danielle Pierce, Regional Director
National Labor Relations Board
Region 31
11500 W. Olympic Blvd, Suite 600
Los Angeles, CA 90064-1753